

BLUE MOUNTAIN ENERGY, INC.

IBLA 97-418

Decided October 19, 1999

Appeal from a decision of the Area Manager, White River Resource Area, Bureau of Land Management, denying a request for refund of rentals paid for rights-of-way. COC-44223 et al.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Federal Land Policy
and Management Act of 1976

Rights-of-way granted for electric or telephone facilities financed or eligible for financing under the Rural Electrification Act of 1936 are exempt from payment of rental under 43 U.S.C. § 1764(g) (1994), as amended by Pub. L. No. 98-300 and Pub. L. No. 104-333, and payments of rental for such rights-of-way are properly refunded.

APPEARANCES: David F. Crabtree, Esq., and Matthew Brimley, Esq., Murray, Utah, for Blue Mountain Energy, Inc.; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Blue Mountain Energy, Inc. (Blue Mountain), has appealed the April 22, 1997, decision of the Area Manager, White River (Colorado) Resource Area, Bureau of Land Management (BLM), denying a request for a refund of rentals paid prior to November 12, 1996, for six rights-of-way (ROW's).

These ROW's were granted under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994), to Blue Mountain's predecessor, Western Fuels-Utah, Inc. (WFU). Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), provides that the holder of a right-of-way shall pay annually in advance the fair market rental value of the right-of-way. See 43 C.F.R. § 2803.1-2(a). Section 504(g) was amended in 1984 by the addition of the following language: "Rights-of-way shall be granted, issued, or renewed, without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as

amended, [7 U.S.C. § 901], or any extensions from such facilities: * * *." Pub. L. No. 98-300, May 25, 1984, 98 Stat. 215. This provision was amended by the Omnibus Parks and Public Lands Management Act of 1996, effective November 12, 1996, by striking "financed pursuant to the Rural Electrification Act of 1936, as amended," and inserting "eligible for financing pursuant to the Rural Electrification Act of 1936, as amended, determined without regard to any application requirement under that Act." Section 1032(a), Pub. L. No. 104-333, Nov. 12, 1996, 110 Stat. 4239. The amendment applies to rights-of-way held on or after the date of enactment of Pub. L. No. 104-333. Id., § 1032(b).

In early October 1996, Deseret Generation & Transmission Cooperative (Deseret) wrote BLM stating that WFU had changed its name to Blue Mountain and was now a wholly-owned subsidiary of Deseret. Deseret requested that this change of name be made for several ROW's. In addition, Deseret explained that both it and Blue Mountain were nonprofit cooperatives financed under the loan programs administered by the Rural Utilities Service (RUS), formerly the Rural Electrification Administration (REA), but that this financing arrangement would cease later that month. Deseret stated its understanding that both it and Blue Mountain were presently exempted from rental fees for ROW's under 43 C.F.R. § 2803.1-2(b)(1)(iii). 1/ "It is our understanding that because both Deseret and [Blue Mountain] are leaving RUS, this ROW fee exemption will be lost, but that both companies would qualify for the ROW fee exemption extended to non-profit organizations under 40 [sic] C.F.R. § 2803.1-2(b)(2)(i)," Deseret stated. 2/ This "change in the applicable regulation under which ROW fee exemptions are granted" would extend to all of Blue Mountain's Colorado ROW's for which Deseret had requested a name change, as well as to a Deseret right-of-way in Utah for an electric transmission line, Deseret concluded.

BLM replied on October 11, 1996, that the rental exempt status Deseret claimed for its Utah facilities could not be applied to WFU's Colorado facilities under Public Law 98-300 because the WFU facilities "were financed by private funding and are not an extension of a REA facility. They are in fact an extension of a coal mine operation." BLM enclosed serial register pages for ROW's held by WFU and briefly described the purpose and rental status of each.

1/ 43 C.F.R. § 2803.1-2(b)(1)(iii) provides that "[n]o rental shall be collected where: * * * [t]he facilities constructed on a site or linear right-of-way are or were financed in whole or in part under the Rural Electrification Act of 1936 * * * or are extensions from such Rural Electrification Act[-]financed facilities." The regulation has not been amended since enactment of Pub. L. No. 104-333.

2/ 43 C.F.R. § 2802.1-2(b)(2)(i) provides that the authorized officer may reduce or waive the rental payment where "[t]he holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise."

Blue Mountain responded to this letter on November 21, 1996, to explain the "financing, operation and control of the Deserado" coal mine:

From its inception the Deserado Mine and its associated facilities have been inexorably tied to Deseret's Bonanza Power Plant. Deseret has been, is, and will likely continue to be Deserado's only customer. The Bonanza Power Plant was designed in every detail to burn coal only from Deserado. * * * Even the location of the Bonanza Power Plant was in large part determined by the location of the Deserado Mine. Bonanza and Deserado were built contemporaneously, and the financing for both projects came from REA loans made directly to Deseret. Certain of these loans were made to Deseret for the mine and the monies were loaned by Deseret to WFU for that purpose. Virtually all of the financing for the development and operation of the mine has been from REA through Deseret to WFU. [3/]

3/ Our description of the relationships among these entities was set forth in Western Fuels-Utah, Inc., 119 IBLA 231, 232 (1991), in which we set aside and remanded a Colorado State Office, BLM, decision denying WFU's application for a reduction in the royalty rate and a waiver of rental for Federal coal leases:

"WFU owns and operates the Deserado Mine, a private railroad, and related coal transportation facilities. All are part of the Bonanza Power Project. The other parts of that project are the Bonanza Power Unit, a coal-fired electrical generation facility located in eastern Utah near the city of Vernal, and related electrical transmission facilities, owned and operated by DG&T [Deseret], a nonprofit generation and transmission cooperative which supplies power to six rural electrification associations serving consumers in six states.

"WFU is a subsidiary of Western Fuels Association, Inc. (Western Fuels). Western Fuels is a nonprofit cooperative which supplies fuel to its membership of 13 rural electric cooperatives and 22 public bodies operating electric utility systems. WFU was organized for the sole purpose of owning and operating the Deserado Mine to supply coal to the Bonanza Power Unit. It delivers coal from the mine in Colorado by railroad to the Bonanza Power Unit in Utah. WFU is owned by DG&T (90 percent) and Western Fuels (10 percent).

"Primary financing for the Bonanza Power Project was provided in 1981 by a \$900 million dollar loan guaranteed by the REA, an agency of the U.S. Department of Agriculture, to DG&T. Pursuant to an October 28, 1981, funding agreement between DG&T and WFU, DG&T lent a portion of the proceeds from the guaranteed loan to WFU for the development of the Deserado Mine.

"On October 28, 1981, DG&T and WFU also entered into a coal sales agreement. Under this agreement, DG&T pays WFU for coal at the cost of production and transportation. WFU also may collect from DG&T payments for a post-mining reclamation fund and a capital recovery and equipment replacement fund. However, WFU does not receive any profit or return on investment from the sale of its coal to DG&T."

(November 21, 1996, letter at 1-2.) "Given that the financing for the Deserado Mine appears to meet the Public Law 98-300 requirements," Blue Mountain stated, "BLM ROW['s] obtained by WFU for the Mine and its associated facilities should have qualified for rental exempt status under 40 [sic] CFR 2803.1-2(b)(1)(iii)." After noting that Deseret's RUS funding ended on October 17, 1996, Blue Mountain added: "[S]ince [Blue Mountain] is a non-profit organization, it should qualify for rental exempt status under 40 [sic] CFR 2803.1-2(b)(2)(i)." Id. at 2.

Blue Mountain stated that WFU "appears to have been paying ROW rental fees to BLM in error for a period of some years" and requested refunds of the following "excess rental amounts":

COC-34338	Access Road	\$75
COC-44223	Powerline	680
COC-31709	Refuse Pile Area	94,500
COC-30119	Conveyor Belt Facility	32,032
COC-31641	Alluvial Well Monitoring Facilities	797
COC-30118	Railroad	73,500
COC-31639	Load-out Loop and Associated Facilities	126,775
TOTAL EXCESS RENTAL PAID TO BLM		\$328,359

Id.

BLM's April 22, 1997, decision states that ROW COC-34338 was granted to WFU on August 26, 1982, for an access road to private property. ROW COC-30118 was issued to WFU on February 24, 1982, for a railroad for hauling coal to a power plant. ROW's COC-30119, COC-31641, and COC-31639 were granted on July 23, 1981, for an access road to haul spoil from the mine to a disposal pile; for alluvial wells (and related pipelines, electrical lines, and telephone lines) to supply water for coal mining operations; and for a railroad loadout facility for loading coal, respectively. ROW COC-44223 was granted on January 15, 1987, for a power line used to light the coal mine disposal pile to allow 24-hour operations. BLM's decision noted that COC-31709 was a lease issued under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), on June 16, 1982, to authorize disposal of spoil from the coal mining operation.

BLM's decision noted that under Pub. L. No. 104-333 the standard for exemption of rent is eligibility for financing under the Rural Electrification Act. "The above-noted rights-of-way all meet this new standard," BLM stated, and "[a]ccordingly * * * are exempt from rental payments, effective November 12, 1996." (Decision at 1.) Concerning Blue Mountain's request for a refund of rental, BLM's decision stated:

In the past, these rights-of-way have clearly been considered to be facilities necessary for the operation of a coal mine, and the question of rent exemptions was never raised by WFU. In fact, when WFU applied for the latest of these [ROW's], COC-44223, they submitted an advance rental deposit with their application. If the mine were to have

been separated from any association with the power plant, by an assignment of coal leases, for example, it could theoretically stand on its own, and offer coal to other markets. With the possible exception of the railroad (COC-30118), and the access road (COC-34338, which only provides access over a previously existing road, to private land owned by [Blue Mountain], but not required for either coal production or any electrical generation, transportation or distribution), all of these facilities would continue to be utilized for the operation of a coal mine. Ultimately, these rights were acquired and held by Western Fuels-Utah, which to our knowledge did not, itself, borrow money from the REA, or with an REA guarantee. While they apparently borrowed money from the Deseret Generation and Transmission, which in turn had an REA guaranteed loan, the actual source of any money loaned to WFU is not clear. This being the case, the request for a refund of rents paid prior to November 12, 1996, is denied.

Id. at 2.

Blue Mountain appealed. Blue Mountain agrees with BLM's conclusion that the ROW's are exempt from rent after November 12, 1996, but appeals the denial of its request for refund of rental paid before that date. ^{4/} BLM did not file an answer in this appeal.

A review of the authorized uses for each of the six ROW's confirms the summary descriptions provided for them in BLM's April 22, 1997, decision. One of them, COC-44223, states it is for a powerline to refuse piles and an air monitoring station. Another, COC-31641, is for six alluvial wells "with related access roads, waterlines, 13.8 KV powerline and telephone line facilities." A third, COC-30118, is for the "construction, operations, maintenance, and termination of a 22 mile single track overhead catenary powered electric railroad, with passing track." COC-34338 is for construction and maintenance of an access road, COC-31639 is for a railroad loadout area, and COC-30119 is for a haul road to a waste disposal area and an overland conveyor to the railroad loadout area.

[1] Whether a right-of-way is exempt from rent under Pub. L. No. 98-300 or Pub. L. No. 104-333 depends on whether it was granted for "electric or telephone facilities * * * or any extensions from such facilities" that were either financed or, after November 12, 1996, eligible for financing, under the Rural Electrification Act of 1936. Although such facilities are not limited to "lines," see South Central Utah Telephone Association, Inc., 98 IBLA 275 (1987) (ROW for microwave repeater financed by the REA that was used for telephone communication is exempt), it is not clear that all of

^{4/} BLM also denied the request for exemption of the lease issued pursuant to section 302(b) of FLPMA, noting that section 504(g) does not apply and there are "no provisions for any form of waiver or exemption (see 43 CFR 2920.8)." (Decision at 1.) Blue Mountain does not appeal this part of BLM's decision.

these six ROW's are exempt as of November 12, 1996, as stated in BLM's April 22, 1997, decision, even if they were all granted for projects that were financed by the REA or eligible for REA financing. Nor is it clear that BLM applied a consistent rental policy to these ROW's. Although one, COC-44223, is for a powerline, and would therefore appear to be exempt, and another, COC-31641, includes such facilities and may therefore be at least partially exempt, BLM's October 11, 1996, letter to Deseret lists both of these ROW's as subject to rental. On the other hand, the letter lists COC-34338 for the access road, which is not such a facility, as rental exempt. The other three ROW's, COC-30118, COC-30119, and COC-31639, are also listed as subject to rental. BLM was apparently not aware when it made its April 22, 1997, decision of the information about WFU in the record of the coal leases we reviewed in Western Fuels-Utah, Inc., *supra*, that indicates that the projects were financed by REA grants to Deseret on behalf of WFU. If, as it appears, one and perhaps more of those ROW's are for electric or telephone facilities, then to the extent rental was paid for those ROW's before November 12, 1996, that rental should be refunded, and those ROW's would continue to be exempt after that date. On the other hand, ROW's not granted for electric or telephone facilities or extensions from such facilities would not be exempt from payment of rental, either before or after November 12, 1996, under Pub. L. No. 98-300 or Pub. L. No. 104-333 or 43 C.F.R. § 2803.1-2(b)(1)(iii) and would not be entitled to a refund of rentals paid.

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We therefore set aside BLM's April 22, 1997, decision and remand the matter to BLM so it may determine whether any of these ROW's were granted for electrical or telephone facilities and therefore qualify for exemption from rental payments.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded.

Will A. Irwin
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

5/ BLM has authority, however, to reduce or perhaps waive rental payments for these ROW's under 43 C.F.R. § 2803.1-2(b)(2)(i), assuming they were granted to a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit-making corporation or business enterprise. See Valley Pioneers Water Co., Inc., 125 IBLA 326 (1993). It was under that regulation that Blue Mountain applied for an exemption after Deseret's RUS funding ceased in October 1996 and it is BLM's responsibility to decide in the first instance whether to grant that application.